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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS,
PETITIONER,

v.

IVORY J. TOWNES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Whether a Fourth Amendment seizure inevitably occurs whenever a person agrees to accompany police officers for questioning but is not expressly told that he is free to refuse.

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OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fourth Judicial District, which reversed defendant's convictions for Rape, Deviate Sexual Assault, and Home Invasion, and remanded the causes for a new trial, is reported at 94 Ill. App.3d 850, 419 N.E.2d 604 (4th Dist. 1981) (See Appendix B). The opinion of the Supreme Court of Illinois, which affirmed the appellate court ruling, and as to which review is now sought, is reported at 91 Ill.2d 32, ____ N.E.2d ____ (1982) (See Appendix A).

JURISDICTION

The opinion of the Appellate Court of Illinois, Fourth Judicial District, was filed on March 31, 1981. The Supreme Court of Illinois granted petitioner leave to appeal on October 19, 1981, and on April 16, 1982, that court filed its opinion in this case.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). The instant Petition for Writ of Certiorari is being filed within 60 days of the filing of the Illinois Supreme Court's opinion.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV provides, in pertinent part, that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The victim in this case testified that on January 16, 1980, she awoke at approximately 3:00 a.m. to find a man standing in her bedroom doorway. He was holding what appeared to be an iron bar and demanded money. After she complied with his demand, he forced her back into bed and committed the sexual acts which formed the basis for the Rape and Deviate Sexual Assault charges. She further testified that, while she was struggling with the man, she hit him on the head with the iron bar and bit his finger.

The victim stated that, due to the darkness, she had been unable to obtain a good view of her assailant. Soon after the occurrence, however, she was able to give the police a general description. She indicated that the intruder was a short black man with a thin build, a moustache, and an "Afro" hairstyle, and that his lips were "thick and full." Although she was unable to identify the intruder from a series of photographs shown to her by the police, she did point out certain features in the photographs which resembled those of her assailant. (There was no evidence to suggest that the defendant's photograph was included in the collection view by the victim.) On the basis of this information, as well as their knowledge of local people with similar criminal records, the police compiled a list of eight possible suspects.

The defendant's name was included on the list, and he was the fifth man on the list to be questioned. Two Danville, Illinois, police officers visited the defendant's residence in Georgetown, Illinois, at approximately 9:00 a.m. on the day following the offense. After being invited into the house by the

defendant's mother, the officers informed the defendant that they "wished to speak to him at the Danville Police Department." When the defendant asked for their reason, the officers told him that they were investigating an entry into a home and an assault upon a woman. The officers suggested that the defendant drive his own car to the stationhouse at his convenience, but the defendant chose to ride with the officers in the police vehicle, and the officers waited five to seven minutes while the defendant went to another part of the house to wash up before leaving. The defendant arrived at the stationhouse with the officers at 9:30 a.m.

According to the officers, the defendant accompanied them to the police station voluntarily, just as the other men on the list of possible suspects had done, and that the defendant was at all times free to leave. They stated that, as far as they were concerned, the defendant was not a suspect, but was merely a part of the investigation which would include the questioning of several other men. The defendant was not handcuffed, photographed, fingerprinted, searched, stripped, nor restrained in any way.

Upon reaching the stationhouse, the defendant was taken into an interview room where an officer read to him the *Miranda* warnings. He initialed a form indicating that he understood these rights. Subsequently, the police conducted a series of interviews with the defendant. He was read the *Miranda* warnings prior to each session.

During the initial interview, which began at 9:37 a.m. and lasted until 9:50 a.m., the defendant provided an alibi with respect to his whereabouts at the time of the offense. When asked to explain the scratches on his neck, he indicated that he received them while playing with his niece. He also stated that he had a bump on his head because the hood of his car fell on him while he was changing the car's battery.

A second interview was conducted from 10:27 a.m. until approximately 10:45 a.m. The defendant was again asked to explain his wounds, and whether he would consent to a search of his home and car. Pursuant to his consent, an officer searched his car and discovered two iron bars. The officer noticed a red substance on one of them, which a laboratory test later revealed was human blood. During the third interview, which began at 11:30 a.m. and lasted about fifteen minutes, the defendant was asked to display his hands. An officer noticed a mark on his left middle finger, which the defendant claimed was caused by a splinter.

At 1:10 p.m., after a lunch break, a fourth interview, lasting only four minutes occurred, during which the defendant was informed that an iron bar with blood on it was found in his car. The defendant stated that he was using the bar to pry off a battery cable when the car hood fell on him. He was then asked if he would submit to a medical examination, and he indicated that he would. The examination revealed scratches and bruises around the defendant's neck, a bump on his head, and a bruise on his left middle finger. The defendant was then returned to the police station at 4:00 p.m. and placed in a lineup. The victim, however, was unable to identify the defendant as her assailant.

A final interview began at 6:00 p.m., at which time the defendant admitted that he was in the victim's apartment and that he had sexual relations with her. However, he maintained that the relations were consensual and that he did not rape her. He further claimed that the victim was not injured when he left her apartment and he thought that any injuries she received resulted from her bumping into something. Following his oral admissions, one of the officers typed the statement and the defendant then signed it. The interview ended at 10:10 p.m. at which time the defendant was formally charged.

Prior to trial, on April 8, 1980, the defendant filed a motion to suppress the statement which he had made to the police officers on the ground that the statement was the fruit of an unlawful seizure. Following an evidentiary hearing on the motion, the trial court denied the motion to suppress on April 28, 1980. The defendant was subsequently tried before a jury for Rape, Deviate Sexual Assault, and Home Invasion. At the trial, the statement made during the defendant's final interview was admitted into evidence. The defendant took the stand in his own defense and testified that he did, in fact, choke and beat the victim, but he denied that the sexual acts were compelled by his violence. Rather, he said, the sexual relations followed the beating in order for the parties to make up. Guilty verdicts on all counts were returned on May 2, 1980.

The appellate court reversed and remanded the cause for a new trial, holding that the statement made by the defendant to the police should have been suppressed because it was elicited subsequent to an illegal seizure. In so holding, the appellate court found the facts of the present case to be indistinguishable from the facts in *Dunaway* v. *New York*, 442 U.S. 200 (1979).

The Supreme Court of Illinois agreed that the present case was similar to *Dunaway* and affirmed the decision of the appellate court. The court stated that the present case was "clearly distinguishable" from *United States* v. *Mendenhall*, 446 U.S. 544 (1980). It rejected the argument that *Mendenhall* supported a characterization of the questioning as voluntary and, thus, not invoking the protections of the Fourth Amendment. Justice Underwood, joined by Chief Justice Ryan, dissented. They found that the defendant was not "seized" when he was transported to the stationhouse, because he had accompanied the officers voluntarily. They further found that probable cause to detain the defendant arose during the earliest interviews, hence the total length of the interrogations was not

material to the question of whether the defendant was unlawfully seized.

REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

THE DECISION OF THE ILLINOIS SUPREME COURT, WHICH IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF SEVERAL FEDERAL COURTS OF APPEALS, HAS SUBSTANTIALLY LIMITED A POLICE OFFICER'S RIGHT TO QUESTION A CITIZEN ON ANY GROUNDS LESS THAN REASONABLE SUSPICION TO BELIEVE THAT THE CITIZEN IS INVOLVED IN CRIMINAL ACTIVITY.

This case squarely presents an important constitutional question left unresolved by this Court's opinions in *United States* v. *Mendenhall*, 446 U.S. 544 (1980), and *Reid* v. *Georgia*, 448 U.S. 438 (1980). Specifically, does a Fourth Amendment seizure inevitably occur whenever a person agrees to accompany police officers for questioning but is not expressly told that he is free to refuse? In *Mendenhall*, this Court divided on the question, with two Justices finding no seizure, three Justices declining to reach the question, and three Justices concluding that a seizure had occurred. In *Reid*, this Court was again divided on the question, with two members of the Court finding no seizure, three assuming the existence of a seizure in their formulation of the case issue, and three again declining to reach the issue because it had not been raised in the lower courts. While this Court has often referred to the concept of consensual police-citizen encounters, *see, e.g.*, *Morales* v. *New York*, 396 U.S. 102 (1969); *Davis* v. *Mississippi*,

394 U.S. 721 (1969); and *Terry* v. *Ohio*, 392 U.S. 1 (1968), the question has never been conclusively determined. *See United States* v. *Morin*, 665 F.2d 765, 768 n. 8 (5th Cir. 1982).

A majority of the Supreme Court of Illinois found that the facts of this case were sufficienty similar to the situation described in *Dunaway* v. *New York*, 442 U.S. 200 (1979), to require a finding that the defendant was seized. The court found that in both cases the accused had been transported to the stationhouse by the police; the police initially lacked probable cause to arrest the accused but they did not tell him that he was free to leave; and the encounters both exhibited a certain quality of purposefulness. Based on the analogy to *Dunaway*, a majority of the Illinois Supreme Court concluded that the defendant herein had been unlawfully seized and that his subsequent statement to the police was properly suppressed.

Crucial to the court's holding was the belief that *Dunaway* stated the test for determining whether a seizure had taken place. Furthermore, the court failed to consider whether the questioning was voluntary and hence not implicating Fourth Amendment protections. In regard to the first factor, it is clear that *Dunaway* does not state a definitive test for distinguishing a Fourth Amendment seizure from a mere voluntary encounter with the police. In *Dunaway*, this Court did not decide whether or not the accused had been seized; rather, the seizure was assumed in this Court's formulation of the issue of the case, based upon the findings of the lower courts and the concessions of the State. 443 U.S. at 202, 205-206. Since there was no suggestion that the accused in *Dunaway* had consented to accompany the police for questioning, this Court had no occasion to distinguish between voluntary submissions to authorities and constitutional seizures. This Court's enumeration of the characteristics of a traditional arrest in *Dunaway* assumed a finding of a seizure, and purported to distinguish a traditional arrest from an investigative stop, rather than to

distinguish a Fourth Amendment seizure from a voluntary submission to police. Since the Supreme Court of Illinois mistakenly relied upon *Dunaway* to determine whether defendant had been seized, its conclusion was in error. (The intermediate courts of appeals in Illinois have adopted a similar interpretation of *Dunaway*. *See People* v. *Townes*, 94 Ill.App.3d 850, 419 N.E.2d 604 (4th Dist. 1981); *People* v. *Dowdell*, 81 Ill.App.3d 266, 401 N.E.2d 295 (3rd Dist. 1980)).

The second factor in the challenged decision, the court's failure to consider whether the questioning was voluntary, is largely attributable to the Illinois Supreme Court's misperception of the rule announced in *United States* v. *Mendenhall*, 446 U.S. 544 (1980). In *Mendenhall*, two members of the Court expressly stated that a person is seized within the meaning of the Fourth Amendment, "only when by means of physical force or a show of authority, his freedom of movement is restrained," and "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. at 553-554. Three additional members of the Court voiced their agreement with that standard in *Reid* v. *Georgia*, 448 U.S. 438 (1980), and several federal courts of appeals have followed suit. *See, e.g.*, *United States* v. *Place*, 660 F.2d 44, 48 (2nd Cir. 1981); *United States* v. *Sanford*, 658 F.2d 342, 344-345 (5th Cir. 1981); *United States* v. *Ocheltree*, 622 F.2d 992, 993-994 (9th Cir. 1980). In contrast, the Supreme Court of Illinois has chosen to ignore the *Mendenhall* test for the existence of a Fourth Amendment seizure and has limited its view of that case to the analysis undertaken in the dissenting opinion. Although this Court has not conclusively determined the question, the decision in this case warrants review, since the opinion of the Supreme Court of Illinois conflicts with the approach taken by several federal courts of appeals and which has been approved by a majority of this Court.

The two dissenting Justices in the Illinois Supreme Court adopted a Fourth Amendment analysis consistent with the opinions of this Court. Justice Underwood, joined by Chief Justice Ryan, found that the majority prejudged the issue by referring to the defendant's journey to the police station as a "seizure" and his presence there as a "detention." The dissenters concluded that, under *Mendenhall*, the defendant had not been seized, since his freedom of movement was never restrained and his responses were voluntarily made. The dissenting opinion noted that the defendant's voluntary consent was not negated by the officers' failure to advise him that he could refuse to consent, since knowledge of a right to refuse is not a prerequisite of voluntary consent. *Mendenhall*, 446 U.S. at 577; *Schneckloth* v. *Bustamonte*, 412 U.S. 218 227-234 (1973). In addition, the dissenters found that even if the duration of the questioning would have tended to erode the voluntariness of the defendant's continued cooperation, no unlawful detention resulted, because probable cause to hold the defendant arose during the first interviews.

The question presented for review has never before been squarely presented to this Court, and as such, this Court has not yet conclusively determined when a police officer's request for a citizen to submit to questioning implicates Fourth Amendment protections. The decision of the Supreme Court of Illinois in this case substantially limits a police officer's right to question a citizen on any grounds less than reasonable suspicion to believe that the citizen is involved in criminal activity. From the viewpoint of law enforcement, the precedent established by the Illinois court's decision is particularly onerous, for it seems almost to preclude the consensual questioning of any persons who might later be implicated in the offense under investigation. Very clearly, the challenged decision is in conflict with the approach taken by the federal courts of appeals and which has been approved by a majority of the members of this Court.

The Supreme Court of Illinois erred in finding that the defendant was unlawfully seized, due to its misinterpretation of this Court's opinions relating to the law of constitutional seizures. The defendant was not seized within the meaning of the Fourth Amendment, because he voluntarily consented to accompany the police officers, and there was no hint of threats or compulsion. Soon after he began to talk, probable cause to detain the defendant arose. The mere fact that he was not expressly told that he was free to withhold his cooperation is not controlling as a matter of law, and is practically meaningless under the circumstances. The defendant's freedom of movement was never restrained; he was in fact free to refuse the officers' requests; and no reasonable person could have understood otherwise in view of the officers' conduct.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the decision of the Supreme Court of Illinois in this case.

Respectfully submitted,

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